INDEX

I. The Trial Judge Was Constitutionally Disqualified 2

II. The Trial Court's Discrediting of Petitioner's Evidence Denied Due Process of Law 10

III. Declaratory Relief in Respect of U.S. Steel Denied Petitioners Due Process of Law 12

IV. Respondent's Fraudulent Exhibits Deprived Petitioners of Due Process of Law 12

Conclusion 13

Appendix 1a

AUTHORITIES

Commonwealth Coatings Corp. v. *Continental Cas. Co.*, 393 U.S. 145 .....2, 4, 5, 6, 9, 10

Hazel-Atlas Glass Co. v. *Hartford-Empire Co.*, 322 U.S. 238 12

Johns Hopkins Univ. v. *Hutton*, 316 F.Supp. 698 9

Kemp v. *Rose*, 1 Giff. 258, 265, 65 Eng. Rep. 910 8

Mayo v. *Beber*, 177 Cal.App.2d 544 9

Oregon-Washington Rwy. & Naviga. Co. v. *Reid*, 155 Or. 602 12

Silas v. *Proctor Coal Co.*, 272 Ky. 477 9

Tumey v. *Ohio*, 273 U.S. 510 ..... 2, 7

U.S. v. *Hoffa*, 245 F.Supp. 772 9

Ward v. *Monroeville*, 409 U.S. 57 ..... 2, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1086

DELONG CORPORATION, and THE TRAVELERS INDEMNITY COMPANY, *Petitioners,*

v.

STATE OF OREGON, *by and through its* STATE HIGHWAY COMMISSION, *Respondent.*

PETITIONERS' REPLY AND SUPPLEMENTAL BRIEF ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

The Brief for Respondent State of Oregon argues procedurally that no substantial federal question is presented by the Questions Presented in the Petition (Points I, II and III, pp 8-23) and then substantively, "aside from jurisdictional considerations", that the Trial Judge was not disqualified (Point IV, pp. 23-26); that the Trial Court correctly evaluated petitioners' evidence (Point V, pp. 27-28); that declaratory relief

involving a party in another action against Petitioners but not a party in the action, was correctly determined (Part VI, pp. 28-32); and that there was no fraud in admission of Respondent's exhibits (Part VII, pp. 32-34). Brief reply to each of these contentions is submitted seriatim but in the interest of brevity the procedural and substantive considerations are discussed together under each point.

I. The Trial Judge Was Constitutionally Disqualified.

Respondent (Br. p. 10) argues that disqualification of the Trial Judge was not raised in the intermediate Court of Appeals below. But Petitioners first learned of the Trial Judge's 1967 substantial business transaction with Respondent while the Petition to Review the Judgment and Opinion of the Court of Appeals was pending in the Supreme Court of the State of Oregon in 1972. On November 15, 1972 Petitioners filed their timely petition for Reconsideration of the Supreme Court's denial (on Nov. 8, 1972) of the Petition for Review and prayed that the Court withhold action until December 4, 1972 because of new matters of extreme importance which had come to the attention of counsel. On November 30, 1972 Petitioners filed the Supplemental Petition for Reconsideration of Petition for Review which set forth the newly learned facts of the Trial Judge's business dealings with Respondent and urged that "on constitutional grounds and in the interest of justice, the judgment herein of the single Trial Judge must be vacated in view of his undisclosed business relationship enjoyed during the pendency of the case * * *." Petitioners cited *Ward* v. *Village of Monroeville,* 409 U.S. 57; *Commonwealth Coatings Corp.* v. *Continental Cas. Co.,* 393 U.S. 145; *Tumey*

v. *Ohio,* 273 U.S. 510, in support of their federal constitutional claim. On December 12, 1972 the Supreme Court of Oregon without hearing or opinion denied both the Petition for Reconsideration and the Supplemental Petition for Reconsideration (Pet. App. p. 2a).

Thus as soon as Petitioners learned the facts upon which their claim of denial of due process of law under the Fourteenth Amendment is based, this claim was made promptly in the Court below in which the case was then pending and was denied by that Court without opinion. In these circumstances Petitioners have done everything possible to assert their federal constitutional rights. Therefore, the constitutional question presented, whether the Petitioners were denied a trial before a Judge with a substantial undisclosed business relationship with the opposing party which might prejudice him, is properly before this Court on the petition for certiorari.[1]

---

[1] After the petition was filed herein the United States District Court for the District of Oregon, on February 27, 1973 denied a motion for preliminary injunction in *DeLong et ano.* v. *Hon. Lee Johnson, Attorney General of Oregon* commenced January 10, 1973 to enjoin the collection of the judgment here involved. On appeal Circuit Judge Walter Ely by order dated March 26, 1973 has temporarily restrained collection of that judgment pending present consideration of the application for a stay pending appeal by the Court of Appeals. That collateral action seeks to enjoin collection of the judgment sought to be reviewed here over objection that such action is a suit against Oregon prohibited by the Eleventh Amendment and other procedural objections. That action was commenced solely to protect Petitioners' rights pending the review sought here. In the absence of review here or a stay pending determination of the injunction action Petitioners may be deprived of any avenue of relief by payment of the judgment and Respondent's

On the merits Respondent strangely argues (Br. p. 24) that receipt of a 1967 mortgage loan of $700,000.00 on farm property purchased from the State of Oregon in 1966 for $175,000.00 and on the adjoining property already owned by the Trial Judge's partnership does not show any increase in value of the property as "There was no sale or other transaction to illustrate a value change". Surely such a substantial mortgage loan secured by the real property is a very substantial transaction indicating the value of the property.[2] But even if Respondent's contention is accepted that no increase in the value is thus indicated the alternative must be that the land already had this value, far in excess of the purchase price, at the time of the purchase in 1966.

Respondent seeks (Br. 25) to distinguish the controlling authority of this Court's decision in *Commonwealth, supra,* on the ground that the Trial Judge's undisclosed business transaction was with an agency of the Government of Oregon other than the Highway Commission directly involved here. But the gravity of

---

contention that it has sovereign immunity from suit to recover the amount paid.

Respondent's charge (Br. p. 15) of vexatious litigation by disappointed Petitioners is baseless. All the litigation between the parties is in the present action and the recently commenced federal injunction suit was solely to avoid Respondent's contention that sovereign immunity prevents any suit to recover the amount of the judgment, once it has been paid and covered into the State's general fund.

[2] A value of $650.00 an acre or $1,200,000.00 was placed on the tract of 1836 acres (754 acres purchased from the State of Oregon at an average of $421 an acre and 1082 acres already owned by the partnership) to support the 60% mortgage loan of $700,000.00 by Prudential Insurance Company. (Pet. App. p. 17a).

BLEED THROUGH POOR COPY

the Trial Judge's undisclosed relationship with a corporate party in litigation before him cannot turn on which division or branch of the sovereign or private corporation is directly interested in the litigation and which division has an undisclosed business relationship with the Judge. The fact that the right hand may not know what the left hand does in governmental or corporate affairs cannot confer immunity from the legal effects of the wrong conduct.

Respondent also argues (Br. 25) that the undisclosed relationship of the arbitrator with a party in *Commonwealth, supra,* was somehow more substantial than the relationship of the Trial Judge with the party in this case. But this Court states in *Commonwealth* that "there had been no dealings between them [the arbitrator and the party] for about a year immediately preceding the arbitration" and before that had involved "fees of about $12,000.00 over a period of four or five years" (393 U.S. at 146). In this case the Trial Judge's partnership paid off the State of Oregon for the land from the proceeds of the mortgage loan in July 1967 and shortly thereafter accepted assignment of the case for trial without disclosing this business transaction. The facts are more compelling than those found sufficient in *Commonwealth* to disqualify the arbitrator.

Although Judge Sloper now states (Res. Br. App. p. 1-A) that, "According to the best of his recollection" the case was assigned to Judge Jones in March 1968, the documentary evidence (App. p. 1a), supported by other evidence of record (App. p. 1a) indicates that the assignment was determined in November or December of 1967. On December 19, 1967, long before March 1968, Petitioner Travelers' counsel wrote to his client's

Seattle office, obviously describing the very pre-trial conference referred to in Judge Sloper's best recollection as having taken place in March, that "It looks like the case will be assigned for trial to Chief Judge George H. Jones". (App. p. 1a). And Petitioner DeLong's Oregon counsel (now deceased) stated on the record at a hearing on January 30, 1973 in the pending collateral federal injunction suit that in the fall of 1967 at a conference in Judge Sloper's office, counsel were advised that Judge Jones would be the trial judge. "This was in the fall of 1967". (App. p. 1a). Bert Rand, Esq., counsel for Petitioners, also recalls that the announcement of Judge Jones' assignment occurred in November 1967. (App. p. 1a). Obviously, Judge Sloper, who refers to no documentary evidence or notes in placing the pre-trial conference and the assignment, was mistaken by four to five months.

If this were a trivial transaction, the fact that even a short time elapsed between payment of the balance of the purchase price for Colony Farm by the Trial Judge and his partners to the State of Oregon and the assignment of this case to the Trial Judge might have given the Trial Court and opposing party the excuse for non-disclosure, not even claimed here, that it might have been honestly forgotten. In *Commonwealth, supra,* over a year had elapsed between the time of the arbitration and a much smaller transaction between the arbitrator and the opposing party. But here the Trial Judge and his partners paid off the entire balance of the purchase price of $150,000.00 with only a small part of the mortgage loan of $700,000.00 Such a transaction was obviously not a routine frequent transaction in the business activities of the Trial Judge and it cannot reasonably be considered as a small transaction

BLEED THROUGH POOR COPY

with an opposing party which was simply forgotten immediately. Indeed it is not contended by Respondent that the transaction actually was forgotten by the Respondent or the Trial Judge at the time this case was assigned for trial.

Respondent suggests (Br. 18) that petitioners counsel in the separate federal action to enjoin collection of the judgment here sought to be reviewed admitted in an argument that the Trial Judge had not been biased or prejudiced. All that counsel admitted was that the Trial Judge was not being charged with conscious or deliberate fraud (Res. Br. App. pp. 27-A, 28-A) but it was never conceded that the Trial Judge's very profitable transaction with the State of Oregon did not prejudice him, consciously or unconsciously, in favor of the State of Oregon. In fact, in his affidavit in the Supreme Court of Oregon, counsel Meade *in haec verba* stated his belief that the trial judge was prejudiced in favor of Respondent and against Petitioners (Pet. App. p. 9a).

Moreover this Court has repeatedly stated that the issue is not whether in fact the judgment was a result of prejudice, a determination most difficult to make, but whether the Judge had a relationship with one of the parties which might influence his mind in reaching judgment. In *Ward supra,* this Court quoted with approval its language in *Tumey, supra,* that the disqualification is not the exercise of actual prejudice but (409 U.S. at 60):

> "* * * the test is whether the mayor's [the trial judge's] situation is one 'which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant or which might lead him not to hold

> the balance nice, clear and true between the State and the accused * * *' ''.[3]

In *Commonwealth, supra,* actual bias of the arbitrator in rendering his decision was not claimed but, as here, failure to disclose the business relationship with the other party was claimed.

Significantly Respondent has not questioned the facts of record concerning the substantial business relationship between Respondent and the Trial Judge. Respondent has not challenged the existence of the clear duty of Respondent and Trial Judge to reveal their substantial business relationship. Respondent has offered no explanation whatever why this relationship was not disclosed and Petitioners given the opportunity to decide whether or not to try this case before Judge Jones without a jury. Petitioners' counsel have sworn that if they had known the facts they would have sought disqualification of the Trial Judge under the applicable Oregon statute (Pet. App. p. 50a) which provides an absolute disqualification in these circumstances (Pet. App. 8a-11a).

Instead of offering some explanation for this nondisclosure which caused this case to be assigned to Judge Jones as the only available trial judge (Pet. p. 16 ftn. 9) Respondent falls back on the argument (Br. p. 26) of "lack of diligence on the part of Petitioners in investigation and discovering the relationship * * *."

---

[3] In *Kemp* v. *Rose, 1 Giff.* 258, 265, 65 Eng. Rep. 910, 913, the rule is stated as follows: "Whether in fact the circumstances had any operation in the mind of the arbitrator must, for the most part, be incapable of evidence, and may remain unknown to every human being, perhaps even unknown to himself. It is enough that such a circumstance did exist."

But as this Court makes plain in *Commonwealth* it is the duty of the Court and the other party to disclose any relationship which might raise a question of the Court's partiality. A rule placing upon conscientious counsel the duty, in order to protect their clients, to investigate undisclosed relationships between the prospective trial judge and the other party would be both impractical and mischievous. It would be impractical because it would impose a delicate and difficult task to investigate and discover undisclosed facts of a character which more properly should be voluntarily disclosed by the trial court or the other party.

It would be mischievous to promulgate a judicial rule which would require widespread and indiscriminate investigation of business affairs of judges to discover the happily very few cases in which an undisclosed disqualifying relationship with another party exists. Obviously the appropriate and efficient sanction is to reverse and withdraw the fruits of a suspect judgment and grant a new trial when an undisclosed relationship is discovered. This constitutional sanction will force timely disclosure in most cases and should be applied here. No lesser sanction is practical or available. Moreover, the authorities cited by Respondent (Br. p. 22) do not support the claimed lack of diligence of Petitioners in uncovering the kind of disqualifying relationship herein involved. For example, *Hoffa* (245 F. Supp. 772) and *Hutton* (316 F. Supp. 698) involved alleged expressions of prejudice by the Trial Judge during the period of the trial which were not, as here, information within the exclusive possession of the other party and the Trial Judge. Similarly *Mayo* v. *Beber*, 177 Cal App. 2d 544, involved prior knowledge, not present here, of the complaining plaintiff concern-

ing prior presentation of the defendant in a similar malpractice case by other members of the Trial Judge's former law firm. And *Silas* v. *Proctor Coal Co.*, 272 Ky. 477, 114 SW 2d 749, involved alleged political bias of the Trial Judge against the plaintiff's attorney which was known to that attorney if it existed.

Respondent deplores (Br. 14) that a reversal here would require retrial of a long and complex litigation. That is true but this is the risk Respondent assumed when it failed to disclose the business relationship with the Trial Judge. A substantial error at trial always involves the possibility of retrial and where, as here, the constitutional right of Petitioners to an impartial tribunal was violated to Respondent's advantage nothing less than a reversal and retrial can vindicate the constitutional rights involved.

In view of the fact that Respondent does not dispute the incontestable facts of record of the business relationship with the Trial Judge or the fact that it was not disclosed to Petitioners this Court might deem this an appropriate case for the summary exercise of its jurisdiction by granting the petition for the writ of certiorari and simultaneously reversing the judgment of the court below and remanding the case for new trial on authority of this Court's decision in the *Commonwealth* case, *supra*.

II. Trial Court's Discrediting of Petitioner's Evidence Denied Due Process of Law.

Respondent contends (Br. p. 27) that petitioners' objections in the appellate courts below to the trial court's ruling in its opinion (Pet. App. 5a) discrediting Petitioners' evidence because a witness was not called to the witness stand to repeat the substance of his deposi-

tion admitted in evidence do not rise to the level of a federal constitutional objection. But Petitioners did expressly contend both in the Court of Appeals (Petition for Rehearing p. 26) and in the Supreme Court of Oregon (Petition for Review p. 48) that failure to award a new trial after the Trial Court refused to give due weight to Petitioners' evidence "deprives a party of due process of law under the constitutions of the State of Oregon and of the United States." Thus the federal question was duly raised and is available for review.

Respondent suggests (Br. p. 28) that the Trial Court discredited Petitioners' evidence as weak or unsatisfactory because Colonel L. B. DeLong, President of Petitioner DeLong Corporation, did not testify as a "live" witness in addition to giving his disposition which was received in evidence by consent and was taken because of his expected absence in Viet Nam during the trial on government construction work. But it was never suggested to Petitioners either by the Trial Court or Respondent that Colonel DeLong's testimony at the trial was required or desired on any issue in addition to the testimony in his deposition. Petitioners learned for the first time from the Court's opinion that its evidence was being discredited for any such reason. Even in its opinion the Trial Court does not indicate on what issue Petitioners should have produced Colonel DeLong's testimony as the best evidence. It was this combination of circumstances which made the Trial Court's erroneous application of the rebuttable presumption not only reversible error under Oregon Law (Pet. pp. 27-29) but also denial of due process of law when applied in the Court's opinion after the trial and after the Petitioners could do anything to correct the error except on appeal.

III. Declaratory Relief in Respect of U.S. Steel Denied Petitioners Due Process of Law.

Respondent argues (Br. pp. 28-32) that Petitioners' contention (Pet. pp. 23-25) in respect of adjudication of liability for all delays to U.S. Steel Corporation is erroneous because the formal declaratory judgment states that "As between plaintiff and defendants" any and all delay to U.S. Steel was caused by the fault of defendant DeLong Corporation. The opinion does not contain this quoted limitation (Pet. App. 7a) and even with the limitation Petitioners in their separate suit with U.S. Steel Corp. are faced with the defense of collateral estoppel and threatened with being deprived of their day in court on the issue whether any and all delays to U.S. Steel in building the bridge superstructure, from whatever cause, are the fault of Petitioners. Petitioners submit that this gratuitous adjudication of their rights in respect of U.S. Steel Corporation deprived them of due process of law.

IV. Respondent's Fraudulent Exhibits Deprived Petitioners of Due Process of Law

Respondent contends (Br. pp. 11-12) that Petitioners' contention that altered and fraudulent exhibits of Respondent were received in evidence at the trial and substantially influenced the decision does not raise a federal question. But Petitioners in their Supplemental Petition for Reconsideration of Petition for Review filed in the Supreme Court of Oregon on November 30, 1972 set forth the newly learned facts concerning the altered and fraudulent exhibits and submitted that a fraud had been committed on the Court, citing *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, and *Oregon-Washington Railway &*

Navigation Company v. *Reid*, 155 Or. 602, 65 P. 2d 664 (1937). Petitioners submit that the judgment based on these exhibits did deprive them of a fair trial and due process of law that a federal question appropriate for review here is presented (Pet. 33).

CONCLUSION

Respondent neither denies the very substantial business relationship with the Trial Judge nor makes any effort to explain or excuse the complete failure to disclose it when this case involving complex issues, great public interest and serious potential financial liability for Respondent as well as Petitioners was assigned to the Trial Judge for trial without a jury. Inadequacy of administrative standards to control business relationships of a judge with parties appearing before him is generally recognized and efforts to improve the situation are being made such as the Code of Ethics for Federal Judges very recently adopted by the United States Judicial Conference prohibiting many business activities and the Code of Judicial Conduct adopted August 16, 1972 by the American Bar Association. But these administrative regulations are not automatically self enforcing or easily enforced by the parties affected. A landmark decision by this Court, which is lacking in this area, would instruct all judges in the federal and state systems with the constitutional importance of strict observance of the administrative standards and would provide compliance which cannot be obtained in any other way. It is submitted that this case provides this Court with the opportunity to lead and give the necessary emphasis to the efforts to assure an impartial judiciary which is essential for the public support of the judiciary.

For all the reasons stated it is respectfully submitted that petition for certiorari should be granted.

Respectfully submitted,

BERT B. RAND
HANS A. NATHAN and
JAMES Q. SMITH,
1730 K. Street, Suite 308
Washington, D.C. 20006

ARDEN E. SHENKER
801 Standard Plaza
Portland, Oregon 97204

Counsel for Petitioners

April 13, 1973

APPENDIX

APPENDIX

DISTRICT OF COLUMBIA, SS:

Affidavit

BERT B. RAND, being duly sworn, deposes and says:

1. I am a member of the Bar of the Supreme Court of the United States and of the Bar of the United States District Court for the District of Columbia, and a member of the firm of Trammell, Rand, Nathan & Lincoln, with offices at 1730 K. Street, N.W., Washington, D.C.

2. I represent Appellant DeLong Corporation as associate counsel in the case pending in the United States District Court for the District of Oregon as *DeLong Corporation and The Travelers Indemnity Company* v. *The Honorable Lee Johnson, Attorney General of the State of Oregon*, Case No. 73-20, and am familiar with all pleadings and transcripts of the hearings in said District Court. I was also actively engaged in trying the case of *State of Oregon, by and through its State Highway Commission* v. *DeLong Corporation and The Travelers Indemnity Company*, Case No. 59323 before the Honorable George A. Jones in the Oregon Circuit Court for Marion County and I am familiar with the proceedings had in the State Court.

3. I have examined the affidavit of Hon. Val D. Sloper, Presiding Judge of the Circuit Court of Oregon for the County of Marion, Third Judicial District, dated 27 March 1973, submitted as Exhibit A (App. p. 3-A) to Appellee's Memorandum in Opposition to Appellants' Application for Injunction pending Appeal. After thorough research of the files, I believe that certain statements made therein are erroneous.

4. In an effort to place the date of assignment of Judge Jones to the case, Judge Sloper states that it occurred during the first or second week immediately subsequent to a pre-trial conference in his office of March, 1968. He further states that at that very conference the attorneys present gave an estimate as to the length of the trial

"depending on whether or not a jury was empaneled". I do not recall such a pre-trial conference nor do the records of myself or my associate counsel show any such pre-trial conference having taken place in March of 1968.

5. The transcript of a pre-trial conference before Judge Sloper of October 30, 1967, shows that the question of whether or not a jury was to be empaneled was resolved at that time. Judge Sloper stated, "I will consider that the case be tried without a jury in Marion County, and I will deny the Defendant DeLong's motion for a change of place for trial". (Tr. Hearing 10/30/67, p. 2). On the basis of the transcript aforesaid, my own recollection and all the files of the case, I believe that Judge Sloper referred to the pre-trial conference of October 30, 1967 and erroneously placed its date into "the first or second week of March 1968".

6. To the best of Judge Sloper's recollection he assigned the case to Judge George A. Jones "one week prior to March 18, 1968" (Aff. Exh. A, lines 28-29). Examination of the files of counsel for Travelers Indemnity Company revealed that on December 19, 1967, Lamar Tooze, Sr., chief counsel for Travelers, sent a letter to the Assistant Claims Manager of the Travelers Indemnity Company in Seattle, Washington, stating, in part, as follows:

> "As I reported to you when you called by telephone on December 14, the above case has been set for pre-trial conference on Monday, February 19 and reset for trial to begin on Monday, March 4, 1968.
>
> I failed to inform you that it looks like the case will be assigned for trial to Chief Judge George A. Jones. It is my impression that the Plaintiff's attorneys are disappointed that Judge Sloper is bowing out of the trial of this case—probably due to the rather unfortunate statement by Mr. Rhoten [counsel for the State] at a conference with the Judge some weeks ago, when he stated that the Plaintiff would be willing to try the case without a jury if it was tried before

Judge Sloper. I believe that we told you about this incident previously."

7. The letter of General Tooze accords with my recollection that we were notified by Judge Sloper in a meeting in Salem, Oregon in November, 1967, that, as we had anticipated for some time previously thereto, Judge Jones would try this case. It was at that time, and in Judge Sloper's chambers, that I first met Judge Jones. My travel records indicate that this meeting must have occurred either between November 13 and 17, 1967, or between December 5 and 9, 1967. I was in Salem and visited the courthouse during both periods. It is my recollection, however, that the announcement of Judge Jones' definite assignment occurred in November 1967.

8. The recollection of George W. Mead, now deceased, apparently was the same as mine. At a hearing below, he stated to the Court:

"So this left to us, in Salem, two trial judges, the third trial—the other trial judge was handling domestic relations cases, and this left to us Judge Sloper and Judge Jones, and Judge Jones, in the fall of 1967, at a conference in Judge Sloper's office, in his chambers, was brought into the case and we were advised that he would be the trial judge at that time. This was in the fall of 1967."

—(Hearing, U.S.D.C. of Or. 1/30/73, Tr. p. 39).

FURTHER AFFIANT SAYETH NOT.

/s/ BERT B. RAND
Bert B. Rand

Subscribed and sworn to before me, this 11th day of April, 1973.

/s/ LOUISE G. BURROUGHS
Louise G. Burroughs
Notary Public
My Commission expires 9-30-75.